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## IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

## SECOND APPELLATE DISTRICT

## **DIVISION THREE**

WENATA M.A. KOSMALA et al.,

B167839

Plaintiffs and Appellants,

(Los Angeles County Super. Ct. No. BC220681)

V.

MAKITA USA, INC. et al.,

Defendants and Respondents.

APPEAL from a judgment of the Superior Court of Los Angeles County, Ray L. Hart, Judge. Affirmed.

The Kick Law Firm, Taras Kick, Matthew S. Levinson and Michael D. McLachlan for Plaintiffs and Appellants.

Law Office of Gerald Philip Peters, Gerald P. Peters; Snyder ♦ Dorenfeld and Bradley A. Snyder for Defendants and Respondents Steinel America, Inc.; Makita USA, Inc.; and Steinel GmBh & Co. KG.

Seifert, Farricker & Gilman and C.M. Gilman for Defendant and Respondent North Los Altos Shopping Center.

#### INTRODUCTION

Plaintiffs appeal a judgment for defendants after a jury verdict found that defendant manufacturers were not negligent for a defective product design or a failure to warn, and found that defendant landlord was not negligent by not installing fire sprinklers in premises leased to plaintiffs.

With regard to the landlord, we conclude that plaintiffs have not shown error in jury instructions regarding installation of fire sprinklers in leased premises, and that defendant's evidence was sufficient to support delivery of a BAJI No. 3.45 "justification" instruction. We also conclude that substantial evidence supported the jury's verdict, and thus there was no error in the denial of plaintiffs' partial motion for judgment notwithstanding the verdict.

With regard to defendants who manufactured and sold the heat gun which caused the fire that damaged plaintiffs' business, we conclude that plaintiffs have not shown error in the admission of testimony by two defense witnesses concerning the design of the heat gun manufactured and sold by defendants. We affirm the judgment.

## PROCEDURAL HISTORY

In the second amended complaint, plaintiffs Wenata M. A. Kosmala as Trustee for the Bankruptcy Estate of Larry and Joan Jarvis, and James Joseph as Trustee for the Bankruptcy Estate of Scott and Tiffany Jarvis, filed a complaint against Makita, U.S.A., Inc. ("Makita") and North Los Altos Shopping Center (landlord). The complaint alleged that the plaintiffs suffered substantial losses as a result of a fire at leased premises in which plaintiffs operated a sporting goods store, and that the individual plaintiffs had filed Chapter 7 bankruptcy proceedings. The complaint alleged landlord's negligence in operating the leased premises, and strict products liability, negligent product liability, and breach of warranty against Makita. Subsequently plaintiffs by amendment added Steinel America, Inc., and Steinel GubH, Co. KG, Steinel Gmbh, Co. KG, and Steinel GmbH KG as defendants.

A judgment reflected the jury's special verdicts. As to Makita, Steinel America, and Steinel GmbH, the jury found there was no defect in design or failure to warn of the product involved, and found that these defendants were not negligent. As to landlord, the jury found that this defendant was an owner or lessor of the premises where the plaintiffs were injured, but was not negligent in management of those premises. Judgment was entered in favor of Steinel America, Inc., Makita USA, Inc., Steinel GmbH & Co. KG, and landlord and against plaintiffs.

Plaintiffs filed a motion for a new trial as to Makita U.S.A., Inc., Steinel America, and Steinel GmbH, and for a new trial and for partial judgment notwithstanding the verdict as to landlord. The trial court denied these motions, and plaintiffs filed a timely notice of appeal on June 2, 2003.

## **FACTS**

Regarding the landlord of the premises leased by plaintiffs, the issues on appeal concern whether the jury was properly instructed on whether the landlord was required to install fire sprinklers in those leased premises and whether, if the landlord was required to install fire sprinklers, the landlord was justified in not installing fire sprinklers.

Regarding the defendants which manufactured and sold the heat gun which started the fire in plaintiffs' premises, the issue is whether the trial court properly admitted testimony concerning the design of the heat gun, and specifically whether the trial court properly admitted testimony concerning the type of switch used to operate the heat gun.

Plaintiffs are Larry and Joan Jarvis, husband and wife, their son Scott Jarvis, and his wife Tiffany Jarvis. Plaintiffs were partners in Play It Again Sports, a franchise business, which sold new and used sporting goods. They owned and operated Play It Again Sports locations in Lakewood, Cypress, and Long Beach, where they leased premises from landlord beginning in 1997.

Employees in the Long Beach store repaired sporting goods equipment at a workbench made of wood and pressed board with a laminate top surface and shelves underneath. Employees used a Makita heat gun to change out and repair blades on

hockey sticks. The heat gun blew hot air out of a nozzle, operating as a powerful hair dryer. The gun had two settings to control the volume of air blown through the gun. The maximum, high-heat number "two" setting made a loud noise; the lower "one" setting made less noise, but was still audible. The heat gun had a dial control to set the air temperature to a maximum of 1100 degrees Fahrenheit at setting number five.

Employees removing and repairing hockey blades used the high setting on the heat gun to melt glue, making it possible to remove the blade from the hockey stick shaft. The heat gun then heated glue on the new blade, which was placed into the hockey stick. The heat gun was turned on and off twice during this process.

After use, employees were instructed to turn off the heat gun and store it by placing it on top of the workbench or on a shelf or hanging it on hooks on a wall grid. The Makita heat gun at the Long Beach store operated normally and had no problems. For a few minutes after use, the heat gun remained hot enough to scorch carpet.

When the Long Beach Play It Again Sports store closed at 8:00 p.m., employees would: lock the front door; turn off lights except for the back row; close the cash register; pick up products on the store floor; store credit card receipts; and turn out remaining lights, set the alarm system, and exit through the rear door, which locked automatically. Closing the store took 10 to 15 minutes. Employees were instructed to check that all equipment and tools were turned off before leaving the premises. Employees were not specifically instructed to check the heat gun before leaving, because it was always off when not in use. Thus there would be no reason to check it.

On November 24, 1997, Chad Jarvis (son of Larry and Joan Jarvis) and Jimmy Goddard (brother of Larry and Joan Jarvis's daughter-in-law) were the only two employees at the Long Beach store. As store manager, Chad was responsible for closing the store. At about 9:00 p.m. on November 24, 1997, a fire took place at the Long Beach store. Fire trucks were dispatched at 9:01 p.m., and arrived at the store at 9:04 p.m.

The fire started at a workbench shelf inside the store. It was caused by a heat gun, which was plugged in and left in the "on" position. The heat gun blew hot air into nearby

combustible materials, causing the fire. During the fire, combustible materials melted onto the heat gun. Smoke would have occurred shortly after the heat gun was placed on the combustible material.

Landlord's Evidence: Plaintiffs leased retail premises from landlord at 2228 Bellflower Boulevard in Long Beach and took possession August 1, 1997. Plaintiffs' leased store did not have fire sprinklers, although an adjacent "Remington" household products store was fire sprinklered. During lease negotiations, the Remington tenant required fire sprinklered premises. Landlord agreed to provide them although it did not believe sprinklers were required by law.

Landlord submitted architectural plans and obtained City of Long Beach building permits for tenant improvement work on the premises in 1994. No permits were pulled for work done for plaintiffs' tenancy in 1997. Landlord never received notice from the City of Long Beach that a permit was needed for work at the Long Beach store. No one advised landlord that the Long Beach store needed to be sprinklered.

Normally landlord employed a licensed contractor, who delivered architectural plans to and requests permits from the city. The City of Long Beach Fire Department had no record of advising either a tenant or landlord to install fire sprinklers at the Long Beach store. The Fire Department had inspected those premises, and no inspection reports required fire sprinklers at the Long Beach store. The Fire Department reviewed and approved plans for improvements to the Remington Shop in the Los Altos Shopping Center, dated January 30, 1994. Those plans state: "Existing retail shops to remain as is. No fire sprinklers." The contractor who installed the sprinkler system for the Remington tenant prepared plans which stated that adjacent spaces, later occupied by Play It Again Sports, were not to be sprinklered. That contractor communicated with Captain Hank Teran of the Fire Department, who was familiar with the plans and had jurisdiction over the contractor's work. The Long Beach Fire Department approved plans submitted for work done on the Remington tenant's space. The contractor understood that fire sprinklers were not required in the Remington space, but the tenant had requested fire

sprinklers. With the Fire Department's approval, the Remington tenant could not be denied this fire protection in a non-sprinklered building, but the rest of the building could not be required to be sprinklered. No code required the rest of the building to be fire sprinklered. The Fire Department expressed no dissatisfaction about the rest of the building not being sprinklered and did not require a retrofit.

Defendant landlord's expert witness, Robert Nelson, testified regarding National Fire Protection Association ("NFPA") Standard 13, section 1-6.1, which states: "A building where protected by an automatic sprinkler system installation shall be provided with sprinklers in all areas." Nelson testified that this standard applied where a code provision required sprinklers, but did not apply where a tenant voluntarily wanted to install a sprinkler system. Nelson testified that the Long Beach Municipal Code did not require the Play It Again Sports premises to be sprinklered when the building was originally built. Nothing in regulations adopted in 1990 by the Long Beach Municipal Council applied to the Play It Again Sports space. Section 1848.240, subsection (k) of the Long Beach Municipal Code could make a code requirement retroactive when: (1) the Fire Chief required sprinklering; (2) building floor space increased by 25 percent; or (3) a change of use changed the occupancy classification. Nelson testified that none of these three things had occurred; therefore nothing in subsection (k) made the 1990 Long Beach Code regarding sprinkler installation applicable to the Play It Again Sports space.

Plaintiffs' expert witness, James F. McMullen, testified that the purpose of NFPA Standard 13, section 1-6.1 (NFPA Section 1-6.1) was to encourage voluntary installation of sprinkler systems. McMullen agreed that construing the NFPA to discourage voluntary installation of sprinkler systems would be a disfavored interpretation. Regarding the 1990 Uniform Fire Code adopted by the Long Beach Municipal Council, which amended provisions requiring installation of automatic sprinkler systems, McMullen testified that the 1990 code did not apply to a 1965 building unless section 1848.240, subsection (k) applied. McMullen agreed that neither of the first two provisions of subsection (k) applied to the Play It Again Sports space.

McMullen admitted that the Fire Department inspected and approved the Play It Again Sports premises in July 1997, and that the Fire Department was the enforcing authority and was responsible for determining whether to require installation of fire sprinklers. McMullen admitted he had no information that the Fire Department ever required installation of fire sprinklers in plaintiffs' Long Beach store.

McMullen admitted that plans approved by the Long Beach Bureau of Fire Prevention in July 1994 refer to sprinklering at the Remington space, and state: "Existing retail shops to remain as is. No fire sprinklers." This meant that installing fire sprinklers in the Remington premises would not include installing sprinklers elsewhere in the building. The Fire Department approved those plans.

Evidence of defendants Makita and Steinel: Friedrich Bonner, Chief Engineer of Quality Management at Steinel GMBH, supervises five engineers who are quality managers for Steinel factories. Bonner has contact with companies purchasing Steinel products and with certification bodies in the United States and other countries where Steinel products are sold. Quality control is one of Bonner's responsibilities; his department tests every heat gun sold in the United States. Bonner receives written reports of problems, and quality managers make monthly reports.

Gerald Zamiski, who has a doctorate in mechanical and material engineering, testified that the heat gun in this case had no electrical or mechanical malfunction that caused or contributed to the fire. Zamiski had no criticism of the heat gun. Zamiski's opinion was that the biggest mistake made by Chad Jarvis, the user of the heat gun, was not leaving the gun in the "on" position, but putting it away near combustible material. Based on his testing, Zamiski testified that for the fire to ignite, something combustible had to be within three or four inches of the nozzle of the heat gun.

Zamiski testified that operating a heat gun heated the nozzle to 656 degrees. When turned off, the heat gun took three to five minutes to cool below 300 degrees. Thus after a heat gun was turned off, its heated nozzle could cause a fire if it had contact with some types of combustible material, such as paper or fabrics.

Zamiski disagreed that the heat gun needed an additional trigger or pressure switch so the heat gun would shut off when an operator ceased to apply pressure. Zamiski testified that the gun was safe for normal use if used with reasonable care. The gun was designed to be used "hands free," but could not be so used if there were additional trigger or pressure switches. Steinel manufactures heat guns with both "rocker" and "slide" switches. In Zamiski's opinion, the Steinel heat gun in this case was safely designed with a slide switch, which made it easy to determine the setting. Also, a rocker switch can be placed inadvertently in the low or "on" position as easily as a slide switch can be, if reasonable care is not taken. Even with a trigger switch, a fire could occur if a heat gun's hot nozzle were placed near combustible material. If an additional switch were required for horizontal use, placing the heat gun on a shelf surface would keep the gun "on," resulting in the same scenario.

Different switches have different amperage requirements. A slide switch usually can handle more amperage than a rocker switch. The difference in amperage may dictate the type of switch to be used on a machine. The HG 1100 is designed with a slide switch, rather than a rocker switch, because of the amperage level required for two blower speeds, temperature control, and the ability to put accessories on the nozzle which direct the air flow.

Plaintiffs' evidence: Plaintiffs' expert H. Harvey Cohen, a human factors and safety consultant, described the accident. Before closing time at the Long Beach Play It Again Sports store, Chad Jarvis had used a Makita heat gun, which is typically used in the number two position. After the fire, the heat gun was found set in the number one position. Chad Jarvis apparently had tried to turn off the heat gun and placed it on a shelf under the workbench, where it remained plugged in. He went through procedures to close the store. The heat gun ignited the workbench, causing a fire.

Cohen testified that Chad Jarvis's errors were failing to turn off the heat gun, failing to hang it up on the rack or place it on top of the workbench instead of placing it

on a shelf near combustible items, and failing to make a positive check at closing time to see that the heat gun was turned off.

Steinel GmbH designed and manufactured the Makita HG 1100 heat gun. Makita markets and sells the heat gun under its name. The heat gun is intended for use in a hands-on, or a hands-free, position.

Plaintiffs called Friedrich Bonner, Steinel GmbH's chief engineer for quality management, as their witness pursuant to Evidence Code section 776. Bonner testified that when set to the number 5 temperature setting and to the number one air flow setting, the heat gun held one inch away from a piece of wood would produce air at 932 degrees Fahrenheit. Bonner tested the HG 1100 heat gun, placing it 20 centimeters from corrugated cardboard and running the heat gun for four days. The cardboard charred but did not catch fire. When the HG 1100 heat gun was placed two inches from corrugated cardboard, the cardboard caught fire in one minute.

Bonner testified that the instruction manual states that the HG 1100 heat gun must not be left unattended, which would be "irregular use." The operator's manual states: "Do not leave tool unattended while running or cooling down." It also states: "The heat gun operates at 1100 degrees Fahrenheit, with no visual indication of temperature (no flame)[.]" The manual states that the heat gun must be used in a clean area. The heat gun will not start a fire when left on if there is no combustible material near it, within a very small range.

Heat guns can be manufactured with rocker or slide switches, depending on the air flow, electronic controls, and other factors of the device. A heat gun with two or more air flow steps has a slide switch. A rocker switch is used for a heat gun with only one air flow.

In 1997, it was feasible technologically to use a trigger switch on a heat gun instead of a slide switch, but Bonner was not sure it was possible for the HG 1100 model heat gun. Steinel manufactures another heat gun, model HL 1800E, with a rocker switch, and sells that model in the United States.

Plaintiffs' witness Lawrence Kamm, a design engineer, testified to his opinion that the HG 1100 heat gun design was defective because it lacked a safety switch. Without a safety switch, it could cause a fire, given its capacity to generate air at 1100 degrees. Kamm installed a safety switch into a working HG 1100 heat gun. The safety switch, a trigger or "dead man's" switch, responds to hand pressure on the heat gun pistol grip. A hand pressing the switch connects power to the heater. Releasing hand pressure on the switch stops the power and the air cools off.

Kamm modified an existing heat gun by adding a trigger switch, like those on electric drills. Kamm also designed a "tail switch" for use when the heat gun is placed in a holder so an operator can use both hands to control the item being heated. The tail switch operated so that if the electrical cord were jostled or the heat gun fell over, the tail switch would turn off the heating element. Kamm admitted that if his modified heat gun were placed on a shelf after being set for hands-free use, it would continue to produce heat if plugged in. Kamm stated that the heat gun could be used in a horizontal position, i.e., on its side. If an automatic shut-off switch were placed on the side of the handle and the heat gun were placed in a horizontal position, it would continue to generate heat, although Kamm believed such a circumstance to be improbable. In a similarly improbable situation, in which a tail switch abutted a shelf, the heat gun would continue to generate heat from the nozzle.

Kamm testified that these design changes to modify the heat gun switch would cause no adverse consequences to the consumer.

Plaintiffs' expert witness Cohen testified that the Makita heat gun was defective, because operation of its slide switch did not give the user a way to readily see, hear, or feel what position the switch was set in, and whether it was off or set to flow speed one or flow speed two. Cohen testified that a better design would be a rocker switch, which resembled a light switch. A rocker switch would have two or three positions, make a click between positions, and flip up for "on" and down for "off." Even better would be a

"dead-man" or trigger switch such as used on a hand drill. When a trigger switch was released, the machine ceased to operate.

Cohen testified that numbers stamped on the HG 1100 heat gun lacked color contrast to show the switch position, making the setting unclear. The HG 1100 also lacked an indicator light to show the product was turned on.

#### ISSUES

Plaintiffs claim on appeal that:

- 1. Erroneous jury instructions require reversal of the judgment for the landlord;
- 2. The trial court erroneously denied plaintiffs' request for limited judgment notwithstanding the verdict as to the landlord's negligence; and
- 3. The trial court erroneously permitted portions of testimony of the manufacturers' witnesses.

## **DISCUSSION**

1. Plaintiffs Have Not Shown Instructional Error

Plaintiffs claim that the jury heard two erroneous instructions.

A. The NFPA Standard 13, Section 1-6.2 Instruction

The jury heard the NFPA Section 1-6.2 instruction: "When partial sprinkler systems are installed, the requirements of this standard shall be used insofar as they are applicable. The authority having jurisdiction shall be consulted in each case."

Plaintiffs claim that the evidence does not support delivery of the instruction, that the landlord untimely requested it, that the jury improperly received a handwritten copy of this instruction, and that delivery of this instruction was prejudicial.

- i. The Evidence Supported Delivery of the NFPA Section 1-6.2 Instruction
- "'A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him [or her that] is supported by substantial evidence. The trial court may not force the litigant to rely on abstract generalities, but must instruct in specific terms that relate the party's theory to the particular case.

[Citations.]' [Citation.] 'A reviewing court must review the evidence most favorable to the contention that the requested instruction is applicable [because] the parties are entitled to an instruction thereon if the evidence so viewed could establish the elements of the theory presented. [Citation.]' " (*Norman v. Life Care Centers of America, Inc.* (2003) 107 Cal.App.4th 1233, 1242.)

Plaintiffs argue that no substantial evidence supported the instruction and no testimony showed that NFPA Section 1-6.2 applied. Plaintiffs cite NFPA Section 1-6.1: "A building, where protected by an automatic sprinkler system installation, shall be provided with sprinklers in all areas. [¶] *Exception: This requirement shall not apply where specific sections of this standard permit the omission of sprinklers.*" (Italics in original.) Plaintiffs interpret NFPA Section 1-6.1 to mean that since landlord provided sprinklers for the Remington store premises, landlord was required to provide sprinklers for the entire building, including plaintiffs' Long Beach store premises. Plaintiffs argue that NFPA Section 1-6.2 was not a specific section providing an exception to the requirement of NFPA Section 1-6.1, and merely requires consultation with local fire authority when another code or local ordinance permits a partial or limited area system.

However, plaintiffs' expert witness, James F. McMullen, admitted that there were exceptions to the NFPA Section 1-6.1. McMullen testified that when there was a partially sprinklered system, NFPA Section 1-6.2 referred the property owner to the local authority having jurisdiction. In this case, that jurisdiction was the Long Beach Fire Department. McMullen was shown plans stamped "Approved, Bureau of Fire Prevention" and bearing a signature from the Bureau of Fire Prevention, Long Beach Fire Department, a handwritten "LBFD," and "signature 7/27/94, final okay." The plans refer to sprinkler installation in the adjacent Remington space, and state: "Existing retail shops to remain as is. No fire sprinklers." The plans state "NIC," an abbreviation for "not in contract." McMullen agreed that "NIC" meant this contract involved installation of fire sprinklers only in the Remington premises. McMullen agreed that the Long Beach Fire Department stamped and approved those plans, as the local authority under NFPA

Section 1-6.2. McMullen testified that the City of Long Beach adopted the 1988 Uniform Fire Code in 1990, and sprinklering requirements of the 1988 Uniform Fire Code did not apply to buildings constructed in 1965, other than through an exception in the code.

Landlord argued to the jury that the Long Beach City Council enacted fire code regulations in 1990, but the 1990 enactment did not apply to a building constructed in 1964 or 1965 unless something in the 1990 enactment made it retroactive. Landlord argued that no exceptions in the fire code made the 1990 enactment retroactive to this building. Landlord also argued that based on testimony of three Long Beach Fire Department officials, from 1990 to 1997 that department did not require sprinklers in the Play It Again Sports premises. The fire department's Bureau of Fire Prevention approved plans to install sprinklering in the adjacent Remington space, but did not require sprinklering in the Play It Again Sports space. Landlord cited testimony by a Captain of the Long Beach Fire Department that the department never required fire sprinklers in the Play It Again Sports space.

Thus landlord contended that the Fire Department did not require it to install sprinklers in the part of its building leased to Play It Again Sports. Under *Norman v. Life Care Centers of America, Inc., supra*, 107 Cal.App.4th at page 1242, landlord provided substantial evidence to support this theory of the case and therefore was entitled to have the NFPA Section 1-6.2 instruction delivered to the jury.

ii. NFPA Section 1-6.2 Was Not an Exception to NFPA Section 1-6.1

Plaintiffs argue that Section 1-6.2 is not one of the exceptions referred to in Section 1-6.1, but merely a requirement to consult with the local fire authority when another code or local ordinance permits a limited area sprinklering system.

Plaintiffs' expert McMullen testified that the City of Long Beach allowed a limited area sprinklering system in this building, which was constructed before enactment of the Uniform Fire Code. Thus Section 1-6.2 was not an "exception" spoken of in Section 1-6.1. Under the circumstances, Section 1-6.2 applied independently. Landlord

introduced testimony of expert witness Joseph Nelson, a civil engineer specializing in structural engineering with 35 years experience working with builders and manufacturers to conform products to building and fire codes. Nelson testified that Section 1-6.1 did not apply to a building where a tenant voluntarily wanted to install a sprinkler system. Instead Section 1-6.1 applied where a code provision required a sprinklering system. Nelson testified that nothing in the Long Beach 1990 enactment made the regulations applicable to the building occupied by Play It Again Sports, built in 1965. Nelson and McMullen agreed that when a tenant wanted sprinklers installed in leased premises, applying Section 1-6.1 to require a landlord to install sprinklers throughout all the remainder of leased premises would tend to discourage installation of sprinklers. Such an interpretation would be contrary to the purpose of the Uniform Fire Code, which was to encourage fire sprinkler installation, not to discourage it.

Thus the jury heard testimony that under the facts, Section 1-6.2 applied to landlord's building, and the policy underlying Section 1-6.2 favored applying it to those facts. Section 1-6.2 was not an "exception" to Section 1-6.1, but a provision that applied independently where justified by circumstances. It was not error to deliver it to the jury.

## iii. The Instruction Was Not Untimely

Plaintiffs argue it was improper to allow the instruction because landlord violated Code of Civil Procedure section 607a by (1) untimely proposing the instruction and (2) by delivering the instruction in handwritten form.

Landlord's counsel submitted the NFPA Section 1-6.2 instruction before closing argument commenced. Code of Civil Procedure section 607a permits parties to propose additional instructions "before the commencement of the argument." (*Phillips v. Treiman* (1967) 249 Cal.App.2d 33, 38.)

Regarding the handwritten proposed instruction, the trial court has discretion to waive this defect. (*Ng v. Hudson* (1977) 75 Cal.App.3d 250, 256, overruled on other grounds in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.)

# B. Landlord's Evidence Was Sufficient to Support Delivery of the BAJI No. 3.45 "Justification" Instruction

Plaintiffs claim that sufficient evidence did not support delivery of the BAJI No. 3.45 "justification" instruction.

The jury heard the following instruction: "If you find that a party to this action violated the regulation just read to you[,] and that this violation was a cause of injury to another, you will find that this violation was negligence unless that party proves by a preponderance of the evidence that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law. In order to sustain this burden of proof, the party violating the regulation must prove by a preponderance of the evidence that he was faced with circumstances which prevented compliance or justified noncompliance with the regulation."

"[T]he regulation just read to you" referred to: "No person shall erect, construct, enlarge, alter, repair, remodel, move or demolish any building or part of a building or structure, or change the character or occupancy or use of any building or structure, or part of [any] building [or] structure, or perform site grading in the City without first obtaining a permit covering such work from the Building Official."

Regarding negligence per se, plaintiffs' counsel argued that based on testimony by expert witnesses and other witnesses, combined with fire code laws, the jury should find a violation of law as to fire sprinklering, which created a presumption that landlord was negligent. Plaintiffs' counsel stated that landlord had the burden of rebutting that presumption by showing that it tried to comply with regulations and its conduct was reasonable under the circumstances. Plaintiffs' counsel argued that landlord could not prove that circumstances prevented compliance or justified its non-compliance with the fire code. Plaintiffs' counsel relied on the NFPA code section stating that where a building is sprinklered it shall be sprinklered throughout, and on the Long Beach Municipal Code requiring retroactive sprinklering of a building when occupancy or square footage changed.

The question is whether, under the standard in *Norman v. Life Care Centers of America, Inc., supra*, 107 Cal.App.4th at page 1242, after a review of the evidence most favorable to the contention that the requested instruction applies, the evidence so viewed could establish the elements of the theory presented. Thus the question is whether substantial evidence exists that landlord did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law. To sustain this burden of proof, as the party violating the regulation, landlord had to prove by a preponderance of the evidence that it faced circumstances which prevented compliance or justified noncompliance with the regulation.

First, the instructions quoted do not support plaintiffs' theory. In the "justification" instruction, "the regulation just quoted" involves a requirement to obtain a permit before building, altering, repairing, remodeling, moving, demolishing, or changing the character, occupancy, or use of a building, or performing site grading. This regulation does not refer to or require fire sprinklering; it involves the requirement of a building permit. Thus it does not support plaintiffs' theory of negligence per se based on defendant's violation of a fire sprinklering requirement.

Second, plaintiffs' review of the evidence of the landlord's justification consists of a citation to two pages of landlord's opposition to the motion for judgment notwithstanding the verdict. This court disregards material which incorporates pleadings in the trial court. (*Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 334.) The two pages cited in the landlord's pleading contain no record citations. This is insufficient to show error, which is never presumed. The plaintiff must affirmatively show, by an adequate record, that the trial court committed error. (*Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 711-712.) A citation to a trial court pleading without record references does not make a sufficient evidentiary showing. Plaintiffs have not met their burden of showing error.

Third, even if the justification instruction were interpreted as applying to a requirement to provide fire sprinklering, landlord cites evidence that it installed sprinklers

in the adjacent space at the request of its tenant, Remington. The contractor who installed the Remington sprinkler system understood that no code required fire sprinklers there in 1994. The Remington tenant requested fire sprinklers, and with the Fire Department's approval, that tenant could not be denied this fire protection in a non-sprinklered building. The rest of the building, however, could not be required to be sprinklered. The contractor who installed the sprinkler system for the Remington tenant prepared plans stating that adjacent spaces, later occupied by Play It Again Sports, were not to be sprinklered. That contractor communicated with Long Beach Fire Department Captain Teran, who was familiar with the plans and had jurisdiction over the contractor's work. The Fire Department approved plans for work in the Remington space in 1994. The plans stated that existing retail shops would remain as is, with no fire sprinklers. The Fire Department never notified landlord that fire sprinklers should be installed, expressed no dissatisfaction about the rest of the building not being sprinklered, and did not require a retrofit.

The Long Beach Fire Department had no record of advising either a tenant or landlord to install fire sprinklers at landlord's property at 2228 Bellflower Boulevard. The Fire Department had inspected those premises, and no inspection reports required fire sprinklers at 2228 Bellflower Boulevard.

Landlord's expert witness, Robert Nelson, testified that NFPA Section 1-6.1 applied where a code provision required sprinklers, but did not apply to a building where a tenant voluntarily wanted to install a sprinkler system. Nelson testified that the Long Beach Municipal Code did not require the Play It Again Sports premises to be sprinklered when the building was built, and the 1990 regulations adopted by the Long Beach Municipal Council did not require fire sprinklering of those premises.

Plaintiffs' expert witness McMullen admitted that the Long Beach Fire

Department inspected and approved the Play It Again Sports premises in July 1997, and
that the Long Beach Fire Department was the appropriate enforcing authority for the
premises and was responsible for determining whether to require fire sprinklers in a

particular area. McMullen admitted he was unaware of any requirement that the Long Beach Fire Department ever required installation of fire sprinklers in landlord's building 2228 Bellflower Boulevard.

The issue of justification or excuse is a jury question. (*Fuentes v. Panella* (1953) 120 Cal.App.2d 175, 183.) Defendant's evidence was sufficient to deliver the BAJI 3.45 justification instruction.

2. Denial of Plaintiffs' Motion for Judgment Notwithstanding the Verdict (JNOV) Is Affirmed

Plaintiffs claim that the trial court erroneously denied their JNOV motion.

Plaintiffs' JNOV motion argued that the evidence did not support the jury's finding that landlord was not negligent.

## A. Standard of Review of the Denial of a JNOV Motion

The trial court's discretion in granting a motion for judgment notwithstanding the verdict is severely limited. The trial judge cannot reweigh evidence or judge witnesses' credibility. If the evidence conflicts or gives rise to several reasonable inferences, the trial court should deny the motion for judgment notwithstanding the verdict. That motion may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that substantial evidence does not support the verdict. The trial court should deny the motion if substantial evidence, or reasonable inferences drawn from it, supports the verdict. (*Garretson v. Harold I. Miller* (2002) 99 Cal.App.4th 563, 568.) When reviewing an order denying a motion for judgment notwithstanding the verdict, an appellate court determines whether any substantial evidence, contradicted or uncontradicted, supports the jury's conclusion. Where such substantial evidence exists, the appellate court must affirm the denial of the motion. (*Carrau v. Marvin Lumber & Cedar Co.* (2001) 93 Cal.App.4th 281, 289.)

## B. Substantial Evidence Supported the Verdict

On appeal plaintiffs argue that the only reasonable inference to be drawn from the evidence is that landlord was negligent in failing to install a fire sprinkler system in

plaintiffs' Long Beach store, that NFPA Sections 1-6.1 and 1-6.2 compel the conclusion that landlord was obligated to install a sprinkler system, and that no excuse or justification was legally available.

Earlier sections of this "Discussion" summarize the evidence supporting the verdict. This evidence provides substantial evidence that landlord was justified in not sprinklering the Long Beach store and that the City of Long Beach had not required landlord to provide fire sprinklering in those premises. We affirm the denial of plaintiffs' motion for judgment notwithstanding the verdict.

3. Plaintiffs Have Not Shown Error in Testimony by Defense Witnesses Zamiski and Bonner

Plaintiffs claim that the trial court abused its discretion in permitting two of defendant manufacturers' witnesses to testify about heat gun design issues.

Plaintiffs cite testimony by their experts, Lawrence Kamm and Dr. Harvey Cohen, that the heat gun was defective in design because it lacked a pressure switch and that its slide switch was prone to be left on inadvertently, which defect had caused the fire. Plaintiffs claim error in the testimony of defense witnesses Gerald Zamiski and Friedrich Bonner, whose testimony addressed defendants' burden of showing that, on balance, the benefits of the challenged design outweighed the risk of danger inherent in that design. (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 432.)

## A. Witness Gerald Zamiski

Plaintiffs claim it was error to admit Zamiski's opinion testimony on design issues because his deposition testimony did not present those opinions and those opinions lacked foundation.

i. Zamiski's Trial Testimony Did Not Violate the Court's Ruling on Defendants' Motion in Limine

Plaintiffs claim that Zamiski's trial testimony about heat gun design violated the trial court's pre-trial *Kennemur*<sup>1</sup> order to exclude any evidence, reference, or comments regarding expert opinions not rendered during the expert's deposition.

The trial court granted defendants' second motion in limine, which sought an order "[e]xcluding any evidence of reference to or comments regarding expert opinions by [p]laintiffs' expert witnesses which were not rendered at the time the experts' depositions were taken[.]" (Italics added.) The trial court specified that defendants' motion in limine instructed "the plaintiffs and their counsel to exclude any evidence or reference or comments regarding expert opinions by plaintiff's expert witnesses which were not rendered during the expert's deposition." (Italics added.) The order extended only to plaintiffs, and thus Zamiski, a defense expert witness, was not subject to that order.

ii. Whether Dr. Zamiski's Trial Testimony Offered New and Additional Opinions

Plaintiffs cite Zamiski's testimony in two areas which they claim were new, additional opinions not previously disclosed in deposition testimony.

a. Plaintiffs Have Not Shown That Zamiski's Trial
Testimony Differed from His Deposition
Testimony, and Error, If Any, Was Invited

First, plaintiffs cite Zamiski's trial testimony that an alternative design with a dead-man's or pressure switch would limit the benefit of horizontal hands-free use of the heat gun. Plaintiffs argue that this testimony was new because at deposition he testified he was unaware of any such application of the heat gun. This is not correct. Zamiski's deposition testimony did reflect his understanding that the heat gun had a hands-free use,

<sup>1</sup> Kennemur v. State of California (1982) 133 Cal.App.3d 907, 918-919.

and that modifying the switches on the heat gun could affect its function. Zamiski testified in his deposition: "[T]he problem with a second or third safety switch, in my opinion, is simply that the gun—the intended design of the product, which is to be handsfree or hand-held, and that it—the gun passes and is approved by all of the UL requirements, which is the standard in the industry." Zamiski was asked:

"Q. So as you sit here today, you do not believe that the HG 1100 can be made safer by adding a trigger or a dead man switch?  $[\P] \dots [\P]$ 

"THE WITNESS: My opinion is the product is safe as it is currently designed, and it has intended functions, which adding other switches may or may not hinder features of the gun.

"BY MR. McLACHLAN:

"Q. What features are those?

"A. Well, for example, if I understand Mr. Kamm's design alterations, he has a pressure switch for the palm that must be held for the gun to be used in a hand-held manner. But for hands-free, I believe he places the second one on one of the rest points of the gun. [¶] Now, does that switch hinder stability of the gun in that manner? And it obviously prevents the gun from being used in a hands-free in any other orientation. You would have to have contact at that pressure point for it to be used hands-free in other orientations. Obviously, the manufacturer intends—or has set up what orientation for hands free, but the pressure switch on the base of the handle would prevent any other orientation of hands-free, such as horizontal, such as if a – "

Moreover the testimony to which plaintiffs object on appeal was elicited by plaintiffs' counsel, cross-examining Zamiski:

"Q. Yes. You were not aware of that, were you, at the time of your deposition?

"A. So you're asking me, did I know at the time of my deposition what uses you could use this for in a horizontal mode?

"Q. Yes.

"A. Oh, I probably didn't have an answer for that, but clearly, it's designed for that."

Plaintiffs elicited this testimony. If admission of this testimony was error, the error was invited and plaintiffs cannot complain of its admission on appeal. (*Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 Cal.App.4th 1538, 1555; *People v. Ramos* (1997) 15 Cal.4th 1133, 1168.)

b. Plaintiffs' Claims Regarding Zamiski's Trial
Testimony Concerning Amperage Requirements
of Different Switches Lack Merit

Second, plaintiffs claim that Zamiski gave an expert opinion related to amperage limitations of rocker switches, but had not provided an opinion on this issue in his deposition testimony. The trial court overruled plaintiffs' objections to defense counsel's questions, which elicited Zamiski's testimony that generally rocker switches and slide switches have different amperage requirements, and a slide switch usually can handle more amperage. Thus a difference in amperage could dictate the type of switch used on a hand-held appliance. Plaintiffs claim this testimony constituted testimony on design issues, and that the trial court abused its discretion in admitting Zamiski's testimony because (1) Zamiski did not present those opinions at his deposition and (2) Zamiski's opinions lacked foundation.

(1) Zamiski's Testimony Did Not Violate the Trial Court's Ruling Prohibiting His Testimony on "Human Factors"

Plaintiffs made a motion in limine to prohibit Zamiski's testimony on "human factors" issues relating to use of the heat gun. The motion also sought to prohibit Zamiski's testimony on product design issues as regards the heat gun. Plaintiffs based both parts of the motion on Zamiski's lack of qualifications as an expert on these human factors or product design issues. The trial court initially ruled to exclude Zamiski's testimony concerning human factors and product design issues, because defense counsel

could not make an offer of proof. During trial, however, the court conducted an Evidence Code section 402 hearing. Plaintiffs' counsel elicited Zamiski's testimony that although his professional competence involved failure analysis and mechanical and material engineering, in a substantial percentage of cases he worked on, the design of the product becomes an issue and he reviews, analyzes, and critiques product design in relation to fire causation and analysis. He addressed whether product design increased or decreased fire hazards, causation, and ignition. On cross-examination, defense counsel elicited Zamiski's testimony about plaintiffs' expert Kamm. Regarding Kamm's statement that the heat gun needed a trigger or pressure switch for horizontal hands-free use, Zamiski testified that of 39 heat guns on the market, all had rocker or slide switches and none had a pressure switch. Requiring pressure switches also would take away key design functions of the heat gun and significantly limit its use. As to plaintiffs' expert Cohen, Zamiski testified that adding a rocker switch would not be an improvement over the existing slide switch, because both switches could be left in an "on" position, as occurred with the heat gun which caused the fire in Play It Again Sports. Defense counsel and the trial court agreed that defense counsel would not elicit Zamiski's testimony on human factors, defined by the court as how the general consumer would use the heat gun. Plaintiffs' counsel, however, stated that there was no objection to Zamiski's testifying to, among other issues, switches and their design characteristics. The trial court ruled that Zamiski was "qualified to testify as an expert as to the design features and the differences between the rocker switch and the slide switch, but not as to the human factors. [¶] And as to the cause of the fire . . . he may testify as to that."

The questions and Zamiski's answers concerning amperage requirements of slide and rocker switches did not involve "human factors" expert testimony. Thus the testimony did not violate the trial court's ruling on plaintiffs' motion in limine.

(2) Because Plaintiffs' Counsel Did Not Depose Zamiski on Amperage Requirements of Different Switches, Zamiski's Trial Testimony on This Subject Was Not Beyond the Scope of His Deposition Testimony

In further discussion, the plaintiffs objected that questions defining rocker and slide switches and why a rocker switch was used instead of a slide switch were beyond the scope of Zamiski's deposition. Defense counsel pointed out that plaintiffs' counsel never asked these questions during Zamiski's deposition. The trial court overruled the objection.

A party "must disclose either in his witness exchange list or at his expert's deposition, *if the expert is asked*, the substance of the facts and the opinions which the expert will testify to at trial." (*Kennemur v. State of California, supra,* 133 Cal.App.3d at p. 919, italics added.) Zamiski was available for deposition by plaintiffs, whose counsel asked many questions about switches which were used, and which could be used, on heat guns. Plaintiffs' counsel did not ask questions about whether rocker switches and slide switches had different amperage requirements, which switch could handle more amperage, or whether a difference in amperage could dictate the type of switch used on a hand-held appliance. Even if *Kennemur* states the applicable rule, plaintiffs' counsel failed to ask questions concerning amperage requirements of rocker and slide switches. Therefore *Kennemur* did not preclude defense counsel from asking those questions.

(3) The Trial Court's Ruling That Zamiski Could Testify as an Expert Witness on Amperage Requirements of Different Switches Was Not an Abuse of Discretion

Regarding the foundation for his expert opinions, Zamiski's professional expertise was failure analysis in mechanical and material engineering, specializing in electrical and gas analyses relating to fire causation. His expertise included analysis of hand-held tools and their role in fire causation. Zamiski was registered as a professional engineer in the State of California and worked for a firm of consulting engineers. Zamiski had a Ph.D.

from UCLA in Mechanical Engineering, an M.S. from M.I.T., and a B.A. from Southern Illinois University. His college courses included four semesters of electrical engineering, including courses on electrical circuits, electrical systems and components, and electrical arcing, as well as courses in the design of machine and mechanical components, engineering design, thermodynamics, ignition combustion, and the high temperature effect on materials. Zamiski had performed failure analysis for the Consumer Product Safety Commission. As a member of the California Conference of Arson Investigators, he gave presentations on fire caused by the failure of home appliances. Numerous computer and home appliance manufacturers employed him to perform failure analysis of their products because of fire.

Zamiski's professional, educational, and practical expertise provided him with sufficient basis to answer questions on amperage requirements of slide and rocker switches. The trial court's ruling to admit Zamiski's testimony on this subject was not an abuse of discretion. (*People v. Catlin* (2001) 26 Cal.4th 81, 131.)

(4) Plaintiffs Have Not Shown that Zamiski's Testimony
Concerning Switches and Amperage Issues Was
Based on Hearsay

Plaintiffs contend that Zamiski based his opinion that a heat gun could not use a rocker switch on Friedrich Bonner's testimony, which was unreliable because Bonner was not qualified to testify as an expert on this subject. Thus plaintiffs claim that Zamiski's reliance on Bonner's testimony was unreliable hearsay.

Asked his understanding as to when a rocker switch could be used on a hand-held appliance and when a slide switch could be used, Zamiski first answered: "I understand, based on court testimony by Mr. Bonner, that it's a function of amperage." The trial court, however, granted plaintiffs' counsel's motion to strike this testimony as hearsay. Defense counsel then, however, asked Zamiski for *his* general understanding, without regard to this particular case, when rocker switches are used in hand-held appliances and when slide switches are used. Zamiski answered that *he* understood each switch had

amperage requirements, and that a slide switch can usually handle more amperage.

Zamiski could rely on his educational and professional expertise and experience,
summarized *ante*, as a basis for answering questions on amperage requirements of slide
and rocker switches.

Thus plaintiffs have not shown hearsay. We find no error.

(5) Plaintiffs Have Not Shown That the Trial Court Erroneously Sustained Objections to Cross-Examination of Zamiski

Plaintiffs claim that the trial court erroneously denied them the opportunity to cross-examine Zamiski fully about his opinions.

The first such denial came after Zamiski testified that a slide switch could usually handle more amperage, and that a difference in amperage could dictate whether to use a slide or rocker switch. Plaintiffs' attorney stated to the trial court that Zamiski's testimony went into areas plaintiffs had not anticipated, and asked for a break. The trial court denied this request. Plaintiffs have made no argument that the denial of a request for a break prevented their counsel from cross-examining Zamiski. Where appellant's counsel asserts a point without argument of or authority for the proposition, the reviewing court may deem it to lack foundation and to merit no discussion. (*Jimmy Swaggart Ministries v. State Bd. of Equalization* (1988) 204 Cal.App.3d 1269, 1294; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

Plaintiffs' second claim arises from questions by plaintiffs' counsel concerning whether Steinel considered alternative designs for the heat gun. Zamiski answered that other than what was in Friedrich Bonner's deposition and exhibits, he knew of no alternative designs that Steinel considered. Plaintiffs' counsel then asked: "[I]s it your testimony that you don't know whether the design of the slide switch on this HG 1100 heat gun can be improved upon?" The trial court sustained defendants' objection to the question as vague, lacking foundation, and calling for speculation. The trial court sustained a similar objection to plaintiffs' counsel's next question of Zamiski: "[I]s there

any manner in which the design of the slide switch on this heat gun can be improved upon to lessen the likelihood of starting fires?"

First, had the trial court admitted Zamiski's answers to these questions, Zamiski would have testified on product design issues. Plaintiffs earlier have claimed such testimony was error, because Zamiski's opinions lacked foundation and exceeded the scope of his deposition testimony. We have rejected this claim, but observe its inconsistency with the instant claim of error that Zamiski was not allowed to testify about product design. Plaintiffs thus claim error both to admit Zamiski's testimony about design issues, and to sustain objections to his testimony about design issues. Second, Zamiski already answered these questions. He testified that no electrical or mechanical malfunction in the heat gun caused or contributed to the fire. Zamiski concluded that the heat gun caused the fire because it was left on and placed too close to combustible materials. Zamiski disagreed with plaintiffs' expert Kamm that trigger or pressure switches should be added to the gun, and testified that the gun was safe as designed for normal use with reasonable care. Zamiski testified that the heat gun was safely designed with a slide switch, and that he had no criticism of the design of the switch on the heat gun.

We find no error.

## B. Witness Friedrich Bonner

Plaintiffs claim it was error to admit Friedrich Bonner's testimony on design issues, because in his deposition he denied knowledge of the design history of the heat gun and failed to produce documents, but then testified at trial to the design issues and produced documents not previously produced.

Bonner's Lack of Knowledge of Design History
 Does Not Preclude His Testimony About the
 Design of the Heat Gun

In his deposition, Bonner stated that the design history of the HG 1100 heat gun was out of his knowledge, except that he had seen a paper of a design of Dr. Schulze-

Frohlich. Bonner's deposition testimony revealed that he did not have knowledge of the design history of Steinel heat guns, which were designed before he started employment at Steinel. Bonner's lack of knowledge of the design history of the heat gun, however, does not preclude him from testifying as to its design. Bonner had been an approval engineer since 1991 until he became chief quality engineer in 2002. As approval engineer, Bonner was responsible for obtaining approvals of Steinel products from certification bodies such as Underwriters Laboratories, CSA, and Verbund Deutscher Elektriker, the German certification agency. Before making any change in design or components of a heat gun, Steinel was required to submit the changed design or new component to the UL for approval. As chief quality engineer, Bonner was responsible for products complying with an international qualify management standard, ISO 9001. He was familiar with some testing Steinel performed on the heat gun. He was familiar with one alternative design considered for the heating element and with the one chosen.

Plaintiffs argue that despite his lack of knowledge of the design history of the heat gun at his deposition, Bonner testified as to design issues at trial. Plaintiffs refer to Bonner's testimony which defendants elicited on cross-examination. Defense counsel asked Bonner why Steinel manufactured an HG 1100 heat gun with a slide switch and an HG 1800 heat gun with a rocker switch. Bonner answered that the switches depended on a heat gun's capabilities. A heat gun with two steps of air flow had to use a slide switch because of the amount of current necessary to operate it. A heat gun with one air flow, or a non-electrically regulated device with two air steps, could use a rocker switch. Bonner had sufficient knowledge to testify as to these design issues. This testimony did not concern the design history of the Steinel heat gun.

ii. Plaintiffs' Remedy for "Improper" Production of Bonner for Deposition Was a Motion to Compel Defendants' Production of the Correct Witness

Plaintiffs argue it was "improper" for Steinel to produce Bonner at the deposition as the person most qualified to answer questions about topics in the deposition notices.

To the extent that plaintiffs claim that defendants produced Bonner for his deposition erroneously because he was not the person most knowledgeable about the subject, plaintiffs should have sought a remedy for that violation by bringing a motion to compel defendants' production of the correct witness. (See *Maldonado v. Superior Court* (2002) 94 Cal.App.4th 1390, 1396.)

iii. Plaintiffs Do Not Identify Bonner's Trial Testimony of Knowledge He Lacked in His Deposition Testimony, and Error in Such Trial Testimony Was Invited

Plaintiffs also argue that Bonner had knowledge at trial which he denied having at his deposition. Plaintiffs argue that after stating in his deposition that he had no knowledge of the design history of the HG 1100 heat gun or similar models, he testified at trial that he was more familiar with these topics than he was at his deposition. Plaintiffs argue that this trial testimony violated *Maldonado* and Code of Civil Procedure section 2025, subdivision (d)(6). Plaintiffs do not identify testimony that requires reversal. This testimony, moreover, was elicited by plaintiffs' counsel, and any error was therefore invited. (*Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn., supra*, 4 Cal.App.4th at p. 1555; *People v. Ramos, supra*, 15 Cal.4th at p. 1168.) Plaintiff also had the opportunity to impeach Bonner's trial testimony with his deposition testimony. (Code Civ. Proc., § 2025, subd. (u)(1); *Newman v. Los Angeles Transit Lines* (1953) 120 Cal.App.2d 685, 696.)

iv. Plaintiffs Waive the Claim of Error Based on Trial

Documents Not Produced in Bonner's Deposition

Plaintiffs also argue that Bonner produced documents at trial which he had not produced in his deposition. Plaintiffs, however, make no further argument concerning these documents, do not identify the documents or their content, or explain how Bonner's use of them prejudiced their case. Plaintiffs have not met their burden of showing reversible error on this issue. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575.) We treat the matter as waived. (*State Farm Fire & Casualty Co. v. Pietak* (2001) 90

Cal.App.4th 600, 611.)

v. Bonner Had Sufficient Personal Knowledge to Testify
About Why Steinel Manufactured the HG 1100 Heat
Gun With a Slide Switch Rather Than a Rocker Switch

Plaintiffs argue that Bonner's testimony on design issues was improper because he was not a designated expert. The testimony to which plaintiffs object was testimony elicited by the defense, which asked Bonner why Steinel manufactured the HG 1100 heat gun with a slide switch and manufactured the HG 1800 heat gun with a rocker switch. Plaintiffs objected that this question called for expert opinion testimony. Defendants argued that this question did not call for expert testimony because Bonner had already responded to plaintiffs' questions about differences in the switches, and was entitled to explain the reasons for those differences. The trial court asked for defendants' offer of proof, which was that the two heat guns had different switches because one had a heat control and the other did not. Plaintiffs' attorney conceded that factual questions about the characteristics and capacity of the heat guns were proper, but questions about why Steinel used one switch rather than another would ask for Bonner's opinions. The defense responded that given Bonner's job at Steinel, he knew reasons why some heat guns had slide switches and other heat guns had rocker switches, and that plaintiffs had already asked these questions. The trial court overruled the objection. Bonner testified that the switches depended on a heat gun's capabilities. A heat gun with two steps of air flow had to use a slide switch because of the amount of current necessary to operate it. A heat gun with one air flow, or a non-electrically regulated device with two air steps, could use a rocker switch.

Plaintiffs claim that Bonner's testimony was expert testimony, which should have been excluded because he was not designated as an expert. "Except to the extent that an expert witness may give opinion testimony not based on personal knowledge, the testimony of a witness concerning a particular matter is inadmissible unless the witness

has personal knowledge of that matter." (*Alvarez v. State of California* (1999) 79 Cal.App.4th 720, 731.)

Bonner, who had a master's degree in engineering, had been employed at Steinel for 10 years in its approval department and for 1 year as chief engineer of quality management. Plaintiffs elicited Bonner's testimony that he had experience dealing with Steinel's products during his employment there. Although he was a quality engineer, he dealt often with people from the Steinel design department and supervised design procedures. Bonner had performed tests on heating capacity, noise volume, and handsfree positioning of the HG 1100. Bonner's education, personal experience with Steinel's products, supervision of employees who designed those products, and testing of those products, all gave him personal knowledge of Steinel products. Thus he could testify on why a slide switch, and not a rocker switch, was used in the manufacture of the HG 1100 heat gun.

We find no merit to plaintiffs' claims of evidentiary error regarding testimony by Zamiski or Bonner.

## **DISPOSITION**

The judgment is affirmed. Costs on appeal are awarded to defendants.

## NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P.J.

ALDRICH, J.